

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CANADA.

BETWEEN

CANADA RICE MILLS LIMITED (Defendant) - Appellant

AND

HIS MAJESTY THE KING, on the information of
the ATTORNEY-GENERAL OF CANADA (Plaintiff) - Respondent.

Case on behalf of Appellant.

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1. This is an appeal from the judgment of the Supreme Court of Canada dated 20th February, 1939, affirming the Judgment of the President of the Exchequer Court dated 13th August, 1938, in favour of the Crown for \$9741.55 arrears of sales tax on rice sold by the Appellant between October 1933 and August 1936.

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2. The Crown's claim is made under Sections 85 and 86 (1) of the Special War Revenue Act, Chapter 179 of the Revised Statutes of Canada, as re-enacted by 1932 Ch. 54, Section 11 and again re-enacted by 1936 Ch. 45, Section 5. Other sections to be considered are Section 98 as enacted by 1932-3, 20 Ch. 50, Section 20; and Section 106 (5) as enacted by 1932, Ch. 54, Section 13.

3. These sections are as follows :—

“Section 85 :—

(A) ‘ sale price ’ for the purpose of calculating the amount of the consumption or sales tax, shall mean the price before any amount payable in respect of the consumption or sales tax is added

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thereto, and shall include the amount of other excise duties when the goods are sold in bond ; and in the case of goods subject to the taxes imposed by Parts X and XII of this Act, shall include the amount of such taxes ; in the case of imported goods the sale price shall be deemed to be the duty paid value thereof ;”

“ Section 86 as enacted in 1932 (22-23 Geo. V. Ch. 54) :

(1) There shall be imposed, levied and collected a consumption or sales tax of six per cent. on the sale price of all goods :

(A) produced or manufactured in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof. Provided that in the case of any contract for the sale of goods wherein it is provided that the sale price shall be paid to the manufacturer or producer by instalments as the work progresses, or under any form of conditional sales agreement, contract of hire-purchase or any form of contract whereby the property in the goods sold does not pass to the purchaser thereof until a future date, notwithstanding partial payment by instalments, the said tax shall be payable pro tanto at the time each of such instalments falls due and becomes payable in accordance with the terms of the contract, and all such transactions shall for the purposes of this section, be regarded as sales and deliveries. Provided further that in any case where there is no physical delivery of the goods by the manufacturer or producer, the said tax shall be payable when the property in the said goods passes to the purchaser thereof :

(B) imported into Canada, payable by the importer or transferee who takes the goods out of bond for consumption at the time when the goods are imported or taken out of warehouse for consumption ; or

(C) sold by a licensed wholesaler, payable by the vendor at the time of delivery by him, and the said tax shall be computed on the duty paid value of goods imported or if the goods were manufactured or produced in Canada, on the price for which the goods sold were purchased by the said licensed wholesaler and the said price shall include the amount of the excise duties on goods sold in bond.”

“ 98 : Where goods subject to tax under this Part or under Part XI of this Act are sold at a price which in the judgment of the Minister is less than the fair price on which the tax should be imposed, the Minister shall have the power to determine the fair price and the taxpayer shall pay the tax on the price so determined.”

“106. (5) In default of payment of the said tax or any portion thereof within the time prescribed by this Act or by regulations established thereunder, there shall be paid in addition to the amount in default, a penalty of two-thirds of one per centum of the amount in default, in respect of each month or fraction thereof, during which such default continues.”

“Section 86 as re-enacted in 1936 (1 Edw. VIII, Ch. 45) :

(1) There shall be imposed, levied and collected a consumption or sales tax of eight per cent. on the sale price of all goods :

10 (A) produced or manufactured in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof.

20 Provided that in the case of any contract for the sale of goods wherein it is provided that the sale price shall be paid to the manufacturer or producer by instalments as the work progresses, or under any form of conditional sales agreement, contract of hire-purchase or any form of contract whereby the property in the goods sold does not pass to the purchaser thereof until a future date, notwithstanding partial payment by instalments, the said tax shall be payable pro tanto at the time each of such instalments falls due and becomes payable in accordance with the terms of the contract, and all such transactions shall for the purposes of this section, be regarded as sales and deliveries.

Provided further that in any case where there is no physical delivery of the goods by the manufacturer or producer, the said tax shall be payable when the property in the said goods passes to the purchaser thereof.

30 Provided further that if any manufacturer or producer has prior to the first day of May, one thousand nine hundred and thirty-six made a bona fide contract for the sale of goods to be delivered after the eight per cent. rate comes into force, and if such contract does not permit the adding of the whole of the eight per cent. tax to the amount to be paid under such contract, then so much of the tax as may not under such contract be added to the contract price shall be payable by the purchaser to the vendor and by the vendor to His Majesty, but in case the vendor refuses or neglects to collect such tax from the purchaser the vendor shall be liable to His Majesty for the payment of such tax ;

40 (B) imported into Canada, payable by the importer or transferee who takes the goods out of bond, for consumption at the time when the goods are imported or taken out of warehouse for consumption ; or

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(c) sold by a licensed wholesaler, payable by the vendor at the time of delivery by him, and the said tax shall be computed on the duty paid value of goods imported or if the goods were manufactured or produced in Canada, on the price for which the goods sold were purchased by the said licensed wholesaler and the said price shall include the amount of the excise duties on goods sold in bond.”

4. The rate of tax is 6 per cent. up to and including April 1936 and thereafter at 8 per cent. There is no dispute as to the amount due if the Crown's right is upheld. 10

5. The Defendant is a Company incorporated in 1929 under the Companies Act of British Columbia. Its head office is at 343 Railway Street, Vancouver, B.C. It owns and operates a rice mill on the Fraser River below the City of New Westminster, B.C. Its business is importing rice and manufacturing it (i.e. milling it) and selling it.

p. 8.

6. On 2nd October 1933 Messrs. D. Gavin, E. D. Dowler, J. C. Ranking, A. S. Gavin, F. A. Loescher, A. E. Mason, N. L. Lauchland and J. F. Sachs formed a partnership for the purpose of buying, selling and otherwise dealing in rice and other products of a similar nature. It is called The Canada Rice Sales Company. 20

p. 54.

7. The members of the Partnership made the necessary declaration under Part IV of the Partnership Act of B.C. (R.S. 1924 Ch. 191) and the partnership was duly registered under that Act. Sections 67 and 68 of the Act are as follows :

“ 67. (1) All persons associated in partnership for trading, manufacturing, or mining purposes shall cause to be filed with the Registrar of the County Court within the territorial limits of which they carry on or intend to carry on business a declaration in writing, signed by the several members of such firm ; and where there is more than one Registrar of that County Court, the 30 declaration shall be filed with the Registrar whose office is nearest to the place of business or intended place of business of the partnership.

(2) If, however, any of the said members are absent from the place where they carry or intend to carry on business at the time of making the declaration, then the declaration shall be signed by the members present in their own names and also for

their absent co-members, under their special authority to that effect, and such special authority shall be at the same time filed with the said Registrar and annexed to the declaration."

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" 68. The declaration shall be in the form or to the effect of Schedule B, and shall contain the names, surnames, additions, and residences of each and every partner as aforesaid, and the firm-name, and shall state also the time during which the firm has existed or is to exist, and declare that the persons therein named are the only members of such firm."

10 8. At all material times the Defendant was a "licensed manufacturer" within the meaning of the Special War Revenue Act. p. 21.

9. The Canada Rice Sales Company was not licensed under the Special War Revenue Act. p. 21.

10. The Defendant Company made its monthly return under Regulation (2) and inserted therein the prices paid to it by The Canada Rice Sales Company and paid the full tax payable on such sales.

11. The Crown contends that the Defendant Company should have paid tax on the higher price received by The Canada Rice Sales Company from its customers, and the Exchequer Court and the Supreme Court of Canada have held that the Crown's contention is correct. p. 21.

12. The action was begun by an Information dated 11th December, 1936, and was tried at Vancouver, British Columbia on the 27th and 30th days of September, 1937, by Mr. Justice A. K. Maclean, the President of the Exchequer Court of Canada, who reserved judgment. On 13th August, 1938, he gave judgment. He held that the Sales Company was not formed as an independent trading unit, but merely as a paper partnership, and that it was given the colour of a partnership and was really another name for the Appellant Company. He gave judgment for the Crown. p. 2. p. 14. p. 13.

13. On 20th October, 1938, the Appellant appealed to the Supreme Court of Canada. The appeal was heard at Ottawa on 20th February, 1939, before the Chief Justice of Canada and Justices Crocket, Davis, Kerwin and Hudson. They affirmed the judgment of the President, but, it is respectfully submitted, on different grounds. They did not hold that the Sales Company was merely another name for the manufacturing Company. They held that the Sales Company was carrying on business for and as agent of the Manufacturing Company. The ground of their decision was agency and not identity. p. 16.

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14. The appeal involves two questions:—

(1) Was the Sales Company the alter ego or the agent of the Appellant, with the consequences that the sales made by Appellant to the Sales Company were not real but fictitious sales ?

(2) If the sales from the Appellant to the Sales Company were in fact real and not fictitious sales can the Appellant be taxed on the price at which the goods were resold by the Sales Company ?

The first question was not raised in the pleadings and was not properly before the Court. 10

p. 2. The action is an action for debt under the Statute. The Information sets out a claim for taxes alleged to be due of which a part has been paid leaving a balance due (Para. 4 on page 3). It is based on sales alleged to have been actually made but claims taxes based on the then ruling wholesale price which, of course, is higher than the price paid to Appellant by the Sales Company.

p. 9. The issue is made clear in the Admissions asked and made— particularly No. 9 on page 8.

There is nowhere any suggestion that the sales from Appellant to the Sales Company were fictitious. 20

p. 25. The point was promptly taken at the trial : Page 25, lines 10 to 31. The Judge offered the Crown an amendment to raise this point but Crown Counsel declined to amend.

15. Subject to the objection that the point is not open the Appellant submits that there is absolutely no evidence that the Sales Company was other than what it purports to be, a partnership lawfully formed and publicly registered, and free to contract with the Appellant or with others. It was not bound to buy its rice from the Appellant, nor was the Appellant bound to sell any rice to it. The purchases by the Sales Company from Appellant were all individual purchases made as and when the parties pleased. It is an independent entity. It is not a fictitious concern. It is not controlled by the Manufacturing Company. It had no power whatever to sell goods in the name of or on behalf of the Manufacturing Company and therefore was not its agent. It fixed its own sale prices and made a small profit. Its staff was not the same as that of the Manufacturing Company. It kept separate books, and the Appellant was able and willing to sell to any other customer at the same price at which it sold rice to the Sales Company in the same quantities. 30

p. 50, l. 35.
p. 33, l. 3.
p. 44, l. 38.
p. 48, l. 26.
p. 43, l. 38.
p. 44, l. 40.
p. 61.
p. 40.
p. 44, l. 1.
p. 44, l. 25.

It is therefore submitted that whatever the legal consequences may be the Sales Company was a real and not an imaginary concern and therefore the sales by the Appellant to it were actual sales and the price paid was an actual sale price.

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16. It must not be supposed that the Act gives the Crown no protection against fictitious transactions. On the contrary the power of the Crown to protect the interests of the Country is carefully preserved in Section 98, which provides that the Minister "shall have the power to determine the fair price" . . . when goods are sold at a price which in the judgment of the Minister is less than the "fair price on which the tax should be imposed." The Act does not say that it shall be lawful for the Minister to declare that a sale is not a sale or that the actual "sale price" is not in fact the "sale price" but it does say that the Minister can himself fix the price. In the case at bar the Appellant petitioned the Minister to exercise this power but he declined to do so. It is submitted that since the Minister declined to exercise his statutory power no basis save the "sale price" remains for the incidence of the tax.

p. 43, l. 30.

This price fixing power had been exercised with regard to various commodities, and in particular with regard to rice when sold by Japanese rice millers in British Columbia: see Exhibit IA, and see the evidence of the Crown's witness Thorburn.

p. 68.

p. 34, l. 10,
to p. 36, l. 44.

17. On the second question (the interpretation of the Statute) the Appellant submits that the sales tax is payable on the "sale price" of goods because Section 86 (1) of the War Revenue Act so states. It does not use the word "price" with any qualification; it does not say "wholesale price," or "retail price," or "market price," or "fair price," or use any adjective whatever about price except the word "sale." It is "sale price."

If this could be made plainer (which it probably could not) it is made plainer in Section 85 which defines "sale price" as being "the price" before certain deductions are made. It is plain beyond argument therefore that the words "price" and "sale price" mean "actual sale price," and it is submitted that there is not one single word in the Act to the contrary either in express terms or by necessary implication.

On the contrary, any inference which can be drawn from other provisions of the Act supports the grammatical meaning of the words. For example, Section 86 (1) provides for three different kinds of sales:

Sales by Manufacturers (Sub-clause (A))

Sales by Importers (Sub-clause (B))

Sales by Licensed Wholesalers (Sub-clause (C)).

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In the first case (manufactured goods) it is the sale price on which the tax is levied, in the second case (imported goods) it is the duty paid value on which the tax is levied and in the third case (domestic goods sold by Licensed Wholesalers) it is "on the price for which the goods sold were purchased" that the tax is based, which accentuates the fact that when Parliament means to assess the tax on something other than the actual sale price it says so. The term "sale price" is the price in respect of each individual sale and therefore if a Manufacturer sells (as he may do) to Wholesalers, Retailers and Consumers at different prices, he pays a tax on his actual sales but at three different prices, but they are all sale prices. All that is required to constitute a sale is a real buyer and a real seller and an actual, as opposed to fictitious, transaction. There is nothing in the Act to the effect that where the buyer and the seller are inter-related or affiliated concerns or have the same members in whole or in part the sale shall be or be deemed to be fictitious. 10

18. The Appellant will refer to the following decisions :—

Palm Olive v. The King (1933) S.C.R. 131.

King v. B.C. Brick & Tile Co. Ltd. (1936) Ex C.R. 71.

Partington v. Atty.-General (1869) L.R. 4 H.L. 100 at 122.

Gramophone v. Stanley (1908) 2 K.B. 89. 20

Pioneer Laundry &c. v. Minister of National Revenue (Judgments of the Chief Justice and Mr. Justice Davis) 12th December 1938.

Versailles Sweets v. Atty.-Gen. of Canada (1924) S.C.R. 466 at 468.

Foss Lumber v. The King (1912) 47 S.C.R. 130 to 140 ; 8 D.L.R. 437 at 439.

Hawker v. Compton (1922) 8 Tax. Cas. 306 at 313.

Dickenson v. Gross (1927) 11 Tax. Cas. 614 at 620 ; 137 L.T. 351 at 353. 30

Levene v. Commrs. of Inland Revenue (1928) A.C. 217 at 227 ; 13 Tax. Cas. 486 at 501.

Lapointe v. Wait (1938) 4 D.L.R. 418.

Commissioners of Inland Rev. v. Duke of Westminster (1936) A.C. I.

REASONS.

19. Appellant submits that the judgments of the President and of the Supreme Court of Canada are erroneous for the following reasons :

- (1) The Sales Company was not carrying on business for or as agent of the Appellant, nor was it a paper partnership or a colourable partnership ; nor was it the alter ego of the Appellant.
- (2) The Sales Company was a separate legal entity and was an independent trading partnership to which the Appellant sold rice. Such sales were actual and not fictitious and the Appellant was therefore under obligation to pay sales tax only upon the price paid to it by the Sales Company.

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MARTIN GRIFFIN.

In the Privy Council.

ON APPEAL

From the Supreme Court of Canada.

BETWEEN

CANADA RICE MILLS

LIMITED (Defendant) - *Appellant*

AND

HIS MAJESTY THE KING,

on the information of the

ATTORNEY - GENERAL OF

CANADA (Plaintiff) - - *Respondent.*

Case

ON BEHALF OF APPELLANT.

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